TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1308. 876

HENRY S. GILSON, PLAINTIFF IN ERROR,

vs.

THE TOWN OF DAYTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 11, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said northern district of Illinois, on Monday, the twenty-second day of November, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and eighty-six, and of our Independence the one hundred and eleventh year.

WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

HENRY S. GILSON *vs.* THE TOWN OF DAYTON.

Assumpsit.

Be it remembered that on the twenty-fourth day of September, 1886, came the plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his *præcipe* for a writ of summons, and also at the same time filed his bond for costs in said above-entitled cause, which said *præcipe* and bond are respectively in the words and figures following, to wit:

2 *Præcipe.*

Circuit Court United States of America, Northern District of Illinois.
December Term, A. D. 1886.

HENRY S. GILSON *vs.* THE TOWN OF DAYTON.

In assumpsit. Damages, $15,000.

The clerk will issue summons in the above-entitled cause, directed to the marshal of said district to execute, returnable to December term of said court.

Springfield, Sept. 22nd, 1886.

SANDERS & HAYNES,
Plaintiff's Attorneys.

Endorsed: Filed Sept. 24, A. D. 1886. Wm. H. Bradley, clerk.

Bond for Costs.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court United States of America. December Term, A. D. 1886.

HENRY S. GILSON, of New Hampshire,
vs.
THE TOWN OF DAYTON.

In assumpsit. Damages, $15,000.

We do hereby enter ourselves security for costs in this
3 cause, and acknowledge ourselves bound to pay or cause to be paid all costs which may accrue in this action, either to

the opposite party or to any of the officers of this court, in pursuance of the laws of this State and of the United States.

Dated this 22nd day of September, 1886,

SANDERS & HAYNES.

Endorsed: Filed Sept. 24, A. D. 1886. Wm. H. Bradley, clerk.

On the same day, to wit, on the twenty-fourth day of September, 1886, came the plaintiff, by his attorneys, and filed in said clerk's office his declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

In the Circuit Court of the United States, Northern District of Illinois. December Term, A. D. 1886.

HENRY S. GILSON, Plaintiff,

vs.

THE TOWN OF DAYTON, Defendant.

Assumpsit. Damages, $15,000.

4 The plaintiff in this suit, Henry S. Gilson, a resident and citizen of the State of New Hampshire, by Sanders and Haynes, his attorneys, complains of the Town of Dayton, a municipal corporation organized and existing under and by virtue of the laws of the State of Illinois, a resident and citizen of the northern district thereof and defendant in this suit, of a plea of trespass on the case on promises.

For that whereas the said defendant heretofore, to wit, on the first day of May, A. D. 1869, by Henry Curyen, supervisor, and Wm. D. Brown, town clerk, at, to wit, the district last aforesaid, made and executed its, to wit, three certain bonds, numbers 2, 3, and 7, commonly called railway aid bonds, each for the sum of one thousand dollars, bearing date the day and year last aforesaid, with interest at the rate of ten per centum per annum, payable annually on the first day of July in each year, payable to the Ottawa, Oswego & Fox River Valley Railroad Company, or bearer, at the Fourth National Bank in the city of New York, and then and there delivered said bonds to the Ottawa, Oswego and Fox River Valley Railroad Company, which said bonds are exact copies of each other, except as to times when due and numbers of bonds written thereon, bond number 2 being due in four years, number 3 in five years, and number 7 in eight years from the 1st day of July, A. D. 1869, and bond number 2 of said issue is in the words and figures following, to wit:

5 No. 2. $1,000.

UNITED STATES OF AMERICA, *State of Illinois.*

(Vignett-.)

Town of Dayton Ten Per Cent. Bond.

[In red ink:] One thousand dollars.

The Town of Dayton, in the county of La Salle, State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said Town of Dayton promises to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York four years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said town is hereby irrevocably pledged.

This bond is one of a series of 12 bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to twelve, inclusive, and is issued in pursuance of an election or special town meeting held in said town on the seventeenth day of April, A. D. 1869, under and by virtue of a certain act of the Legislature of the State Illinois, approved February 18th, 1857, entitled "An act
6 authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election or special town meeting a majority of the legal voters participating at the same voted "For subscription" to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company in the sum of $12,000.00 and to issue the bonds of said town therefor, and the said election or special town meeting was by the proper authorities then and there declared duly carried "For subscription," previous application in writing of fifty legal voters of said town for such an election or special town meeting specifying the amount to be subscribed and the conditions of such subscription having been made to the clerk of said town, and the said town clerk having called said election or special town meeting in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

In witness whereof the supervisor and town clerk of said town have hereunto set their hands and seals this first day of May, A. D. 1869.

[Stamp.]

WM. D. BROWN, [SEAL.]
Town Clerk.

HENRY CURYEN, [SEAL.]
Supervisor.

On the back of this bond is [the] following endorsement:

7 AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *Nov. 10th*, 1869.

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

In testimony whereof I have hereunto subscribed my name and affixed the seal of my office the day and year aforesaid.

[SEAL.] C. E. LIPPINCOTT,
Auditor P. A.

And plaintiff avers that said bonds were each of them duly registered in the office of the auditor of public accounts of the State of Illinois on the tenth day of November, A. D. 1869, as certified to by said auditor on the back of said bonds.

And plaintiff avers that said bonds were executed and issued by said town of Dayton in pursuance of an election duly called and held in compliance of law in said town of Dayton prior to the adoption of the present constitution of the State of Illinois, at which election a majority voting were in favor of the issuing of said bonds.

And plaintiff avers that there are attached to bond number seven of said issue three coupons or interest warrants, each
8 for the sum of $100, and each representing one year's interest due on bond; said coupons are serially numbered 6, 7, & 8, and due July 1, 1875, to July 1, '77, inclusive, and are exact copies of each other, except as to serial number and time when due, and coupon serial No. 6, due July 1st, 1875, is in the words and figures following, to wit:

6.

Town of Dayton, $100. Interest warrant No. 7.

The Town of Dayton, State of Illinois, will pay to bearer on the 1st day of July, A. D. 1875, one hundred dollars at the Fourth National Bank in the city of New York, being one year's interest on the bond numbered above.

H. CURYEN, *Supervisor.*
WM. D. BROWN, *Town Clerk.*

And plaintiff further avers that he purchased the above-mentioned bonds & coupons in the usual course of commercial business for an investment, paying therefor a good and valuable consideration long before the same were due and payable, and without any notice of any claimed defect or irregularity in their issue or want of power to issue them, relying upon the faithful action of the town and State officials in their issue and registration, and upon all laws and judicial decisions in existence at the time they were voted and issued for their validity, and especially upon the act of March 6, 1867, found in vol. 1, page 866, Private Laws of Illinois of 1867.

9 By reason whereof and by force of the statute in such case made and provided the said defendant became liable to pay the said plaintiff the said sum of money in the said bonds & coupons specified and interest thereon according to the tenor and effect of the said bonds & coupons, and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and faithfully promised the said plaintiff well and truly to pay to the said plaintiff the sums of money in the said bonds and coupons specified according to the tenor and effect of the said bonds & coupons as aforesaid.

SANDERS & HAYNES,
For Plaintiff.

Endorsed: Filed Sept. 24, 1886. Wm. H. Bradley, clerk.

10 On the same day, to wit, on the twenty-fourth day of September, 1886, there issued out of said clerk's office a writ of summons in said entitled cause, which said writ, together with the return of the marshal endorsed thereon, is in the words and figures following, to wit:

Summons.

NORTHERN DISTRICT OF ILLINOIS, *ss*:

Circuit Court of the United States of America.

The United States of America to the Marshal of the Northern District of Illinois, Greeting:

We command you to summon the Town of Dayton, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Henry S. Gilson of a plea of trespass on the case upon promises, to his damage, as is alleged, of fifteen thousand dollars, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 24th day of September, in the year of our Lord one thousand eight
11 hundred and eighty-six, and of our Independence the 111th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Marshal's Return.

I have duly served the within writ by reading the same to Basil Green (supervisor of said town of Dayton), in his presence and hearing, and also by personally delivering to him a true copy thereof the 28th day of September, A. D. 1886.

FRED'K H. MARSH,
U. S. Marshal,
By W. H. DUTCHER, *Deputy.*

Endorsed: Filed Sept. 30, A. D. 1886. Wm. H. Bradley, clerk.

12 Afterwards, to wit, on the twenty-first day of October, 1886, came the defendant, by its attorney, and filed in said clerk's office its demurrer to the declaration in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit Court of the United States. October Term, A. D. 1886.

HENRY S. GILSON *vs.* THE TOWN OF DAYTON.

Now comes the said defendant, The Town of Dayton, by G. S. Eldredge, its attorney, and defends, etc., and says that the first count of the said plaintiff's declaration and the matters and things therein contained are insufficient in law to be answered unto; wherefore the said defendant prays judgment, etc.

THE TOWN OF DAYTON,
By G. S. ELDERIDGE,
Its Attorney.

Endorsed: Filed Oct. 21st, 1886. Wm. H. Bradley, clerk.

13 Afterwards, to wit, on the twenty-second day of November, in the adjourned October term of said court, 1886, in the record of the proceedings thereof in said entitled cause, before Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

Judgment.

HENRY S. GILSON *vs.* THE TOWN OF DAYTON.

Assumpsit.

Now comes the parties, by their respective attorneys, and now comes on to be heard the demurrer of the defendant to the declaration filed herein, and, after hearing the arguments of the counsel, the court, being now fully advised upon said demurrer, sustains the same.

It is thereupon considered and adjudged by the court that judgment upon said demurrer be, and the same is hereby, entered against said plaintiff and in favor of said defendant, and that this cause be dismissed at the costs of the plaintiff, and that execution issue therefor.

14 Afterwards, to wit, on the twenty-sixth day of November, 1886, there was filed in said clerk's office a bond in said entitled cause, which said bond is in the words and figures following, to wit:

Bond.

Know all men by these presents that we, Henry S. Gilson, of Milford, New Hampshire, and George A. Sanders, R. W. Haynes, and Frank W. Tracy, of Springfield, Illinois, are held and firmly

bound unto The Town of Dayton in the penal sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 24th day of November, A. D. 1886.

The condition of the above obligation is such that whereas the said Town of Dayton did, on the 22d day of November, A. D. 1886, in the circuit court of the United States for the northern district of Illinois, and of the October term thereof, recover a judgment against the above-bounden Henry S. Gilson for costs on demurrer to the declaration of said Henry S. Gilson, from which said judgment said Henry S. Gilson has prayed and obtained a writ of error to the Supreme Court of the United States:

Now, therefore, if the said Henry S. Gilson shall prosecute his writ of error to effect and, if he fail to make his plea good,
15 shall answer all damages and costs, then the above obligation to be void; otherwise to remain in full force and effect.

HENRY S. GILSON,
By GEORGE A. SANDERS, [SEAL.]
His Attorney.
GEORGE A. SANDERS. [SEAL.]
RALPH W. HAYNES. [SEAL.]
FRANK W. TRACY. [SEAL.]

Approved, to act as supersedeas.

H. W. BLODGETT, *Judge.*

Endorsed: Filed Nov. 26, 1886. Wm. H. Bradley, clerk.

16 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court in the cause wherein Henry S. Gilson is the plaintiff and The Town of Dayton is the defendant, as the same appear- from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this twenty-seventh day of November, 1886.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY, *Clerk.*

17 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

The President of the United States of America to the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is before you in said circuit court, be-

tween Henry S. Gilson, plaintiff, and The Town of Dayton, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Henry S. Gilson, defendant, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1887, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-sixth day of November, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 111th year.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

WM. H. BRADLEY,
Clerk of the United States Circuit Court for the Northern District of Illinois.

18 [Endorsed:] Supreme Court of the United States. Henry S. Gilson, plaintiff in error, *vs.* The Town of Dayton, defendant in error. Writ of error. Copy deposited for the defendant in error in the clerk's office U. S., northern district of Illinois.

19 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

To The Town of Dayton, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1887, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Henry S. Gilson is plaintiff in error and said The Town of Dayton is defendant in error, to show cause, if any there be, why the judgment entered and therein mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett, judge, this 26th day of November, in the year of our Lord one thousand eight hundred and eighty-six.

H. W. BLODGETT, *Judge.*

Service of the above citation is hereby admitted this 7th day of December, 1886.

THE TOWN OF DAYTON,
B[y] G. S. ELDREDGE, *Its Att'y.*

20 [Endorsed:] Supreme Court of the United States. Henry S. Gilson, plaintiff in error, *vs.* The Town of Dayton, defendant in error. Citation to October term, A. D. 1887.

[Endorsed:] Sup. Court U. S., 1886. Oct. term. No. 1308. Henry S. Gilson, pl'ff in error, *vs.* The Town of Dayton. Citation, with proof of service. Office Supreme Court U. S. Filed Dec. 14, 1886. James H. McKenney, clerk.

Endorsed on cover: N. Illinois C. C. U. S. No. 1308. Henry S. Gilson, plaintiff in error, *vs.* The Town of Dayton. Filed December 11, 1886.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 1305

HENRY S. GILSON, *Plaintiff in Error,*

vs.

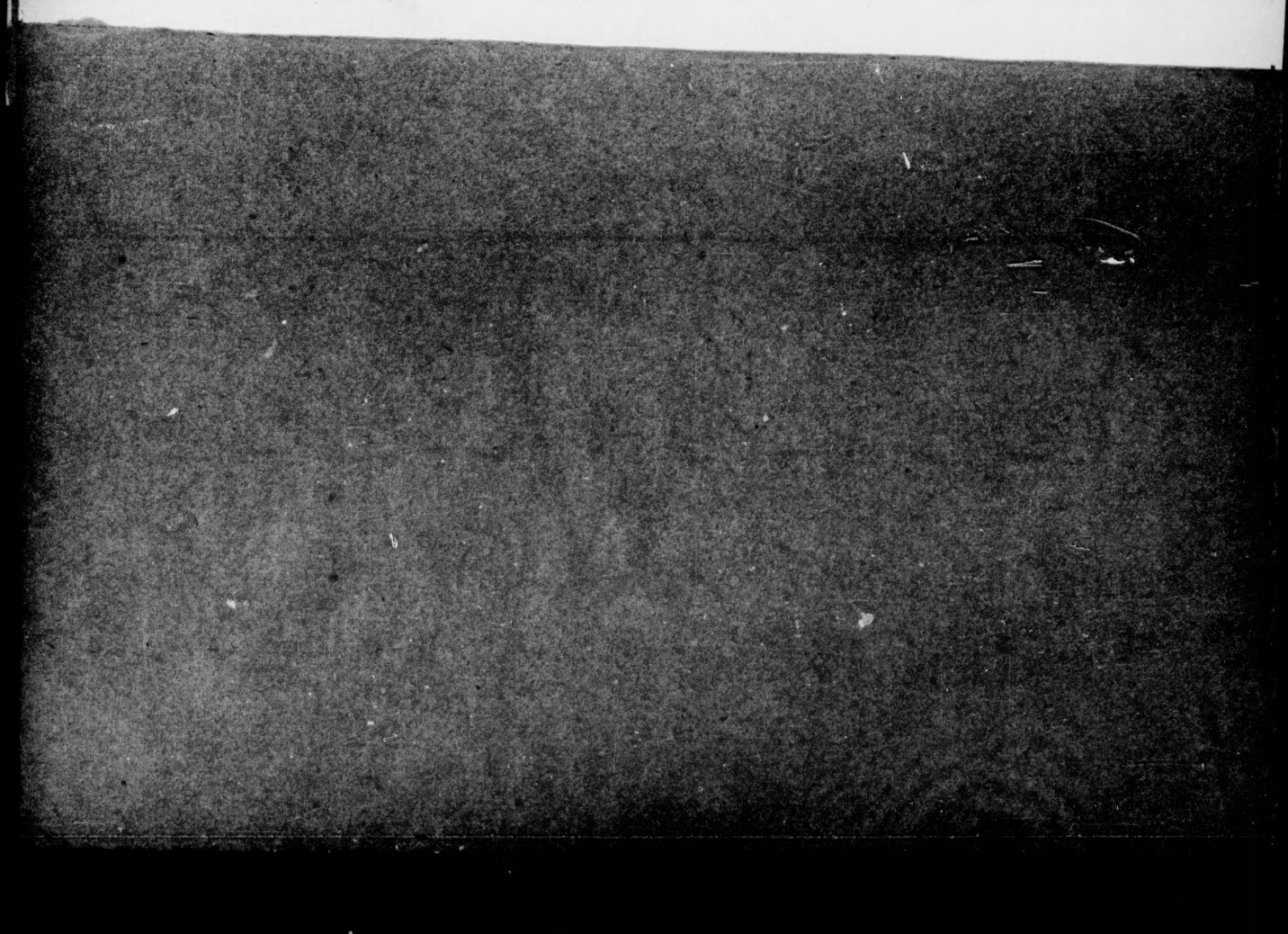
THE TOWN OF DAYTON, *Defendant in Error.*

Error to the Circuit Court of the United States—Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

GEORGE A. SANDERS,
For Plaintiff in Error.

SPRINGFIELD, ILL.:
H. W. ROKKER, STATE PRINTER AND BINDER.
1886.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

At the October Term, A. D. 1886.

No. .

HENRY S. GILSON, *Plaintiff in Error,*

vs.

THE TOWN OF DAYTON, *Defendant in Error.*

Error to the Circuit Court of the United States—Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

On the 18th day of February, 1857, the Legislature of Illinois passed an act entitled "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads," the said act having special reference to the

IN THE

SUPREME COURT

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UNITED STATES.

At the October Term, A. D. 1886.

No. .

HENRY S. GILSON, *Plaintiff in Error,*

vs.

THE TOWN OF DAYTON, *Defendant in Error.*

Error to the Circuit Court of the United States—Northern District of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

On the 18th day of February, 1857, the Legislature of Illinois passed an act entitled "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads," the said act having special reference to the

Ottawa, Oswego & Fox River Valley Railroad Company, and found in Public Laws of Illinois, page 225. This law was declared void and of no force, by reason of its not appearing, by the legislative journal, to have passed as required by the Constitution of 1848, the third reading of the Senate, by this Honorable Court, in *Post* v. *Supervisors and the Amoskeag Bank* v. *Ottawa*, 105 U. S. 667, and in *The Town of South Ottawa* v. *Perkins*, 94 U. S. 260.

On the 6th day of March, 1867, the Legislature of Illinois passed an act entitled "An act to authorize the counties of Woodford, LaSalle and Livingston, and the townships, cities, incorporated towns and corporations in said counties, to subscribe to the capital stock of any railroad company that now is, or hereafter may be, incorporated in the State of Illinois."

Private Laws of the State of Illinois, vol. 1, 1867. p. 836.

On the 17th day of April, 1869, a special election was held in the town of Dayton, LaSalle county, at which a majority of the legal voters participating therein voted to subscribe to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad Company the sum of $12,000, and to issue bonds of said town therefor.

On the 1st day of May, 1869, twelve bonds, for $1,000 each, were executed by Henry Curger, then supervisor, and William D. Brown, then town clerk. These bonds were in the usual form of such municipal obligations, with interest at ten per centum per annum, payable annually at the Fourth National Bank of the City of New York, upon the presentation and delivery of the several interest coupons as they became due. The bonds were duly registered by the Auditor of State of Illinois on the 10th day of November, A. D. 1869, under an act of the Legislature in force April 16, 1869.

Interest on these bonds was paid for several years, and until legal proceedings were commenced, which culminated in the decisions above cited of this Court, holding the law under which they purport on their face to have been issued—that of February 18th, 1857, void as above stated.

Suit in Assumpsit was commenced at the October term of the U. S. Circuit Court, for the northern district of Illinois, by the plaintiff in error, for the amount due on the bonds, and interest thereon, as stated in the declaration. The defendant demurred to the special count, and the Court, on argument, sustained the demurrer, and the plaintiff appeals to this Court from that decision.

One averment of the plaintiff in his declaration, which the demurrer admits to be true, is as follows, to-wit: "And the plaintiff further avers that he purchased the above-mentioned bonds and coupons in the usual course of commercial business for an investment, paying therefor a good and valuable consideration, long before the same were due and payable, and without any notice of any claimed defect or irregularity in their issue, or want of power to issue them, relying upon the faithful action of the town and state officials in their issue and registration, and upon all laws and judicial decisions in existence at the time they were voted and issued, for their validity, and especially upon the Act of March 6th, 1867, found in Volume I, page 866, Private Laws of Illinois of 1867."

The questions in the case are: Whether the bonds sued on are valid under a law, in full force at the time the vote was taken, and the bonds issued and delivered, which was not recited in the bonds, and which gave ample power for their issue, and which

was substantially complied with in the election and issue of the bonds in question, and on which the plaintiff relied in the purchase of the bonds.

And *second*, Whether the plaintiff is bound, by a recital of a void law in the bonds, when there was in full force and effect another law, giving ample power to issue the bonds, and with the terms and conditions of which there was a compliance in the election and issue of the bonds.

And *third*, Whether the recital of a void law on the bonds should not be treated as a mere surplusage, or a false recital on bonds in the hands of a *bona fide* holder for value, and without notice, under the law merchant, there being a law in force when the vote was taken and the bonds issued, giving ample power for the election and issue of the bonds, and under which they might have been legally voted and issued, and on which the purchaser relied when he made his purchase of the bonds.

ASSIGNMENTS OF ERRORS.

1. The Court erred in not overruling the defendant's demurrer.

2. The Court erred in sustaining the defendant's demurrer, and dismissing the cause.

3. The Court erred in not finding for the plaintiff and holding the bonds valid obligations of the defendant.

4. The Court erred in not holding as surplusage a recital of a void law on the face of the bonds, when there was a law in full force and effect, when the bonds were voted and issued, under which they might have been issued, and with the terms of which

there was a substantial compliance in the vote and issue of the bonds and upon which the plaintiff relied in the purchase of the bonds.

For convenience of the Court we give copy of the bonds sued on, and of the law of February 18, 1857, under which the bonds purport to have been issued, on their face, and the law of March 6, 1867, under which there was full power for the vote and issue of the bonds.

COPY OF BOND NO. 2.

"No. 2. UNITED STATES OF AMERICA. $1,000.

"STATE OF ILLINOIS—TEN PER CENT. BOND.

"TOWN OF DAYTON.

"The town of Dayton, in the County of La Salle, State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said town of Dayton promises to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, four years from the first day of July, A. D., 1869, with interest from the first day of July, A. D., 1869, at the rate of 10 per cent. per annum, payable annually at said bank, upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said town is hereby irrevocably pledged.

"This bond is one of a series of twelve bonds bearing even date herewith, each for the sum of ONE THOUSAND DOLLARS, numbered from one to twelve inclusive, and is issued in pursuance of an election or special town meeting held in said town on the seventeenth day of April, A. D., 1869, under and by virtue of a certain act of the Legislature of the State of Illinois, approved February 18, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election or special town meeting, a majority of the legal voters participating at the same voted *for subscription* to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad

Company in the sum of $12,000, and to issue the bonds of said town therefor, and the said election or special town meeting was, by the proper authorities, then and there declared duly carried *for subscription*, previous application in writing of fifty legal voters of said town for such an election or special town meeting specifying the amount to be subscribed and the conditions of such subscription having been made to the Clerk of said town, and the said Town Clerk having called said election or special town meeting in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the Supervisor and Town Clerk of said town have hereunto set their hands and seals this 1st day of May, A. D. 1869.

"HENRY CURGER, *Supervisor*, [SEAL.]

[STAMP.] "WILLIAM D. BROWN, *Town Clerk*, [SEAL.]"

ENDORSED.

"AUDITOR'S OFFICE, ILLINOIS,
"SPRINGFIELD, Nov. 10, 1869.

"I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the within bond has been registered in this office this day, pursuant to the provisions of an act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16, 1869.

"In testimony whereof, I have hereunto subscribed my name, and affixed the seal of my office, the day and year aforesaid.

[SEAL.] "C. E. LIPPINCOTT, *Auditor P. A.*

The coupons are in the usual form.

COPY OF THE LEGISLATIVE ACT OF FEB. 18, 1857.

"An Act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads. In force Feb. 18, 1857.

"SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, that any city, county, incorporated town, or any township now or hereafter organized under the township organization laws, which may be situated on or near the route of the Ottowa, Oswego & Fox River

Railroad, or of the Chicago, Amboy & Upper Mississippi Railroad, or of the Joliet and Mendota Division of the Joliet & Terre Haute Railroid, as the same may have heretofore or may hereafter be surveyed and located, may become subscribers to the stock of any such road, and may issue bonds for the amount of such stock so subscribed with coupons for interest thereto attached, under such limitations and restrictions and on such conditions as they may choose and the directors of said company may approve, the proposition for said subscription having been first submitted to the inhabitants of such city, town, county or township, and approved by them. And upon application of any fifty voters of any city, county, incorporated town or township as aforesaid, specifying the amount to be subscribed and the conditions of said subscription, it shall be the duty of the clerk of such city, town, county or township immediately to call an election in the same manner that other elections for said city, county, town or township are called, for the purpose of determining whether said city, county, township or town will subscribe to the stock of railroad; and if a majority of said votes shall be "For subscription," then the County Court or Board of Supervisors having jurisdiction over county matters in said county, or the corporate authorities of said city or town, or the Supervisors and Town Clerk of such township so voting shall cause said subscription to be made, and upon its acceptance by the directors of said company shall cause bonds to be issued in conformity with said vote, which bonds shall in no case bear a higher rate of interest than 10 per cent. per annum, and shall not be of less denomination than one thousand dollars, and shall be accepted by said company at their par value.

§ 2. "Any township in Kendall County, and the township of Plainfield, in Will County, shall have like power to subscribe for the stock to any railroad now or hereafter located through said township, and issue bonds therefor in the same manner as provided in section first, or to vote a sum not exceeding five thousand dollars to pay damages for right of way through said town for any such railroad."

§ 3. "This act shall be in force from and after its passage, and shall be liberally construed for the purposes expressed therein, and shall be held to be a public act."

§ 4. "It shall be the duty of the proper authorities of any city, incorporated town, county or township issuing bonds as aforesaid to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon, and to levy such taxes as may be necessary therefor as other taxes are levied by them." Approved February 18, 1857.

COPY OF ACT OF MARCH 6, 1867.

"An act to authorize the counties of Woodford, LaSalle and Livingston, and the townships, cities, incorporated towns and corporations in said counties, to subscribe to the capital stock any railroad company that now is, or hereafter may be, incorporated in the State of Illinois."

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly,* that the counties of Woodford, La Salle and Livingston, and the townships, cities, incorporated towns and corporations in said counties that now or hereafter may be organized in said counties, may become subscribers to the capital stock of any railroad that now is or hereafter may be incorporated in this State, and may issue bonds for the amount of such stock so subscribed with coupons for interest thereto attached, under such limitations and restrictions and on such conditions as to them may seem right for the best interest of the counties, townships, cities, incorporated town, or other incorporation, any, all or either of them, and directors of said railroad company may approve of the proposition for any such subscription, the same having first been submitted to the legal voters of such county, township, city, incorporated town or other corporation, as aforesaid and approved by a majority of said legal voters, who may vote upon the question and upon the application of twenty legal voters and tax-payers of any county, township, city, incorporated town, or of three members of any corporation as aforesaid, specifying the amount to be subscribed, said amount not to exceed the sum of one hundred thousand dollars for any one such county, township, city, incorporated town or other corporation, to be subscribed for any one railroad company (and the amount that any corporation may vote to subscribe shall be be left to said corporation, and the railroad company in which said corporation (takes stock) and the conditions of said subscription shall be set forth in said application, and it shall be the duty of the clerk of such county, township, city, incorporated town, or other corporation immediately to call an election by the posting up of notices at least twenty days in each township or voting place in said county, if the vote is to be taken by a county, or if by a township, then by the clerk of said township, in three of the most public places in said township, or if by a city, at three of the most public places in said city, or if by an incorporated town, at three of the most public places in said incorporated town, or if by a corporation, then at the usual places of holding election in the State for the election of their corporation officers. Said election shall be held for the purpose of determining whether said county, township, city, incorporated town or corporation shall subscribe to the stock of the railroad company named in said call and notices; and if a majority of said voters voting at said election shall be

for subscription, then the county court or board of supervisors having jurisdiction over the county matters of said county, or the corporate authorities of such city, incorporated town, or supervisor of such township, or the president of such corporation shall make, or cause to be made said subscription to said capital stock of said railroad company, and upon said subscription so voted being accepted or received by the directors of said railroad company, shall cause bonds to be issued in compliance with said vote, which bonds shall in no case bear a higher rate of interest than ten per cent. per annum, and said interest shall be paid out of the treasury of the county in which any of the said townships, cities, incorporated towns or corprations shall be located, and said bonds shall not be for a less amount than one hundred dollars, each of which said bonds may run for a term of years not exceeding twenty: *Provided*, each county, township, city, incorporated town or corporation may by their votes determine on what part of said railroad, their stock, so by them voted and subscribed, shall be expended and said bonds shall be accepted by said railroad company at their face or at par value.

"§ 2. It shall be the duty of the clerk of any township, city, incorporated town or other incorporation, to return the poll-book of said election, so held in such township, city, or incorporated town or other corporation, together with a certificate of the result of said election, to the county clerk, of the county or counties in which said township, city, or incorporated town or other corporation may be located, within ten days after said election. And if a majority of the legal voters of such county, township, city, or incorporated town, shall have voted for said subscription, then it shall be the duty of the county clerk of each county in which any such town, city, or incorporated town has voted such stock, to annually thereafter cause to be computed and extended on the taxable property, both real and personal, returned by the assessor of each county, township, city, incorporated town, or other corporation, which have voted to subscribe for any such stock a sum sufficient to pay the interest on all such amounts so voted and named in the bonds so issued by the respective counties, townships, cities, incorporated towns, or other corporations, which tax shall be collected as other taxes, and when collected, shall be paid into the county treasury as other county taxes.

"§ 3. It shall be the duty of said county treasurer to pay out the same, on the presentation to him of the bonds or bond so issued by any county, township, city, incorporated town, or corporation, as aforesaid, the amount due on each of said bonds, as interest, out of any money or moneys in his hands for that purpose, and receive the interest coupons then due, as vouchers for the same. He shall also keep a separate account with each county, township, city, incorporated town, or corporation, which account shall at all times be subject to inspection of all persons interested.

"§ 4. At all elections for officers, or other questions to be voted upon by the stockholders of said railroad corporations, in which said stock is taken, the Chairman of the Board of Supervisors, the Supervisors of said town, the Mayor of said city, the President of said incorporated town, and the President of said corporation, or by proxy of either of the aforesaid, shall represent and cast the votes which said stock, so subscribed, is entitled to.

"§ 5. It is further enacted that no mistake in the giving of the notice, or in the canvass, or return of votes, or in the issuing of the bonds, shall in any way invalidate the said bonds so issued: *Provided*, that there is a majority of the voters at such election in favor of such subscription.

"§ 6. This Act shall be deemed a public Act, and shall take effect from and after its passage.

"Approved March 6, 1867."

BRIEF.

The law of March 6, 1867, was in full force and effect and had been for nearly two years when the vote was taken April 17, 1869, for subscription, and when the bonds involved in this suit were issued and delivered, May 1, 1869.

This act of March 6, 1867, gave ample power for the vote and issue of the bonds in question, and all conditions precedent in the vote and issue of the bonds demanded by this act, were substantially complied with in the vote and issue of the bonds, and the purchaser of the bonds had a right to rely upon this act for the power to issue the bonds.

Commissioners of Knox Co. v. *Aspinwall*, 21 How., 539.
Gelpecke v. *Dubuque*, 1 Wall., 203.
Supervisors v. *Schenck*, 5 Wall., 784.
Lexington v. *Butler*, 14 Wall., 282.

The certificate of the corporate officials on the bonds in question recites, that at the election held on the 17th day of April,

1869, the requirements of the law were duly complied with, and that a majority of the legal votes were cast "*For Subscription.*" This is conclusive as to this fact. Municipal bonds held by *bona-fide* purchasers bought before maturity, in good faith, for a valuable consideration, and without notice of any defense, have been held valid, where there appeared adequate legislative authority therefor; and where a vote of the people is recited on the face of the bonds, the municipality is estopped from denying the election.

County of Warren v. *Marcy*, 97 U. S. 104.
Commissioners v. *Bolles*, 94 U. S. 104.
Township of Empire v. *Darlington*, 101 U. S. 87.
Marcy v. *Town of Oswego*, 92 U. S. 638.
Town of Coloma v. *Eares*, 92 U. S. 484.

The bonds reciting on their face a *void* act, that of Feb. 18, 1857, as legislative authority, when the valid act of March 6, 1867, giving ample power to issue the bonds, was in force; and that an election had been held as required by law, at which a majority of the electors voted for subscription, such false recital, as to the power to issue the bonds, must be chargeable to the carelessness or fraud of the officers of the town charged with the duty of executing and delivering the bonds, and no loss thereby should fall upon a *bona-fide* holder of bonds purchased without notice and for a valuable consideration before maturity.

Marcy v. *Township of Oswego*, 2 Otto. 637.
Coloma v. *Eares*, 2 Otto. 484.

If there was *any legislative power in existence* at the time the bonds were issued, for the vote and the issue of the bonds in question, an innocent purchaser had a right to rely upon it, and the bonds are valid.

Maher v. *City of Chicago*, 38 Ill. 273.

The Court may look beyond the recitals for legislative authority to issue municipal bonds.

Commissioners v. *January*. 94 U. S. 204.

Where the wrong act is recited on the bonds as legislative authority for the issue, and there remains the statement that the bonds are issued in pursuance of the vote of the electors, the recital of the wrong act will be rejected and the bonds held valid under an existing act granting the power to issue them, though not recited on the face of the bonds.

Anderson County Commissioners v. *Beal*, 113 U. S. 227.
Commissioners of Johnson County v. *January*, 94 U. S. 202.
Burr v. *Chariton*, 2d McCrary, 603.

The recital of the act granting the power is not a necessity on a municipal bond. It is valid as negotiable paper under the law merchant, when *any power* excited for its issue, even though not disclosed upon its face.

Dillon Munic. Corp., Vol I. 541.
Ackley School District v. *Hall*, 113 U. S. 139.
Moran v. *Miami Co.*, 2 Black, 722.
Mercer Co. v. *Hackett*, 1 Wall. 83.
White v. *Railroad*, 21 How. 576.
Thomson v. *Lee Co.*, 3 Wall. 331.
Commissioners of Marion Co. v. *Clark*, 94 U. S. 278.
Cromwell v. *County of Sac*, 96 U. S. 51.

In a suit by a *bona fide* holder against a municipal corporation to recover the amount of coupons annexed to bonds issued by it, under authority conferred by law, questions of form merely, or

irregularity, or fraud, or misconduct on the part of its agents, cannot be considered.

Town of East Lincoln v. *Davenport*, 94 U. S. 801.
Town of Rock Creek v. *Strong*, 96 U. S. 271.

The bonds in this suit appearing regular on their face in every particular, we think the doctrine of equitable *estoppel* is applicable.

Commissioners v. *January*, 94 U. S. 202.

ARGUMENT.

In this case two things are necessary for the plaintiff to establish, to validate the bonds in controversy. The existence of legislative authority for their issue, and a substantial compliance with the terms and conditions of the power granted. It is admitted that the Act of March 6, 1867, was in force and effect nearly two years before the vote was taken, and the bonds of the defendant issued and delivered, and was in force at that time, May 1, 1869.

Reference to the Act above quoted will disclose the fact that it granted ample power to all the towns in LaSalle county, Illinois, of which the defendant is one, to subscribe an amount not to exceed $100,000 to the capital stock of *any railroad* that then existed, or that thereafter may be incorporated in the State of Illinois, on a vote, approved by a majority of the legal voters of the town. The amount of such subscription, under the above limitation, was to be determined by the voters of the corporation voting upon the proposition, and the railroad company, whose stock they were to take, and bonds were to be issued in compliance with said vote in payment of the stock voted. The only question of importance in the case is, *was there power to issue the bonds?* For if there was, it is found in the Act of March 6, 1867, and there

was a substantial compliance with all of its terms and conditions, sufficient, under the rulings of this Court, to validate the bonds, on all questions that may arise, on the exercise of the power in the vote and the issue of the bonds. Having shown the power to vote and issue the bonds, in the act of March 6, 1867, the plaintiff is entitled to all the benefits of a *bona fide* holder for value without notice in the decisions cited that are applicable in this case. It is a well established doctrine of this Court that a purchaser of municipal bonds has a right to rely upon *any power in existence*, when his bonds were issued to validate them when payment is refused.

In the case of *Gelpecke* v. *City of Dubuque*, 1 Wall., 203, the language of the Court is: "*Where a corporation has power, under any circumstances, to issue negotiable securities, the bona fide holder has a right to presume they were issued under the circumstances which give the requisite authority*, and they are no more liable to be impeached for any infirmity in the hands of such a holder, than any other commercial paper."

This doctrine is so well established, and has been so constantly affirmed, that nothing more can be said upon it.

Supervisors v. *Schenck*, 5 Wall., 784.

Commissioners of Knox Co. v. *Aspinwall*, 21 How., 539.

Lexington v. *Butler*, 14 Wall., 282.

Royal British Bank v. *Turgrand*, 6 Ellies & Blackburn, 327.

Wilmorth v. *Crawford*, 16 Wendell, 343.

Alleghany City v. *McClurkan*, 14 Penn. State, 83.

The existence of the power in the Act of March 6, 1867, at the time the vote was taken, and the bonds in controversy, issued by the defendant, being shown by an examination of the Act, it is

important to inquire whether the terms and conditions of the Act were complied with in the vote and execution of the bonds. It will be noticed on examination of the Act of March 6, 1867, on which we rely for the power, that as to the terms and conditions of the calling of the election, the returns, the conditions of the subscription to the stock, the kinds of bonds to be issued and the terms of payment thereof, it is almost identical with the Act of February 18, 1857, under which the bonds purport to be issued on their face. There is no important condition precedent in the Act of March 6, 1867, which was not substantially complied with in the vote and issue of the bonds. If that Act, instead of the Act of February 18, 1857, had been cited on the bonds, there is no question whatever but that they would have been held good by any United States Court on the questions of ample power to issue the bonds, and a substantial compliance with the conditions precedent, demanded by the Act of 1867. On this branch of the case, the exercise of the power, the certificate of the corporate officials is conclusive evidence that all requirements, over which they have authority, have been performed. If there was no recitals as to the election on the bond, there would be ampl authority for it, under the general laws on that subject, in force at the time. The principal requirement in the exercise of the power, *is the holding of the election, and a fair expression of the voters on the proposition,* and it makes no difference whether it was held under the general election laws of the State, or under a law cited on the bond, or a law, in existence, but not cited.

Any deviation from the terms and conditions of the Act of March 6, 1867, and they are very slight, and non-essential in a

case like this, must be considered as an "*irregularity*" in the exercise of the power under a long line of cases in this Court, a few of which we cite.

County of Warren v. *Marcy*, 97 U. S. 104.
Commissioners v. *Bolles*, 94 U. S. 104.
Township of Empire v. *Darlington*, 101 U. S. 87.
Marcy v. *Town of Oswego*, 92 U. S. 638.
Town of Coloma v. *Eaves*, 92 U. S. 484.

But the defendant will doubtless claim that if the recitals are of value in estopping the town from denying the election, they are equally binding on the plaintiff as to the source of power recited in the bonds as issued under the act of 1857. In reply to this we simply say that a *bona fide holder* for value, purchasing before maturity and without notice, under the decisions of this court, is not responsible for the *carelessness, misconduct, irregularities or fraud* of the officials exercising the power in calling the election and issuing the bonds. It is sufficient for the plaintiff that the power to call the election and issue the bonds is found in the act of March 6, 1867, in force before, at the time and long after the vote was taken, and the bonds issued in substantial compliance with all the conditions precedent required by that act.

"A *bona-fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it."

County of Sac. v. *Cromwell*, 96 U. S., 51.

"If a municipal corporation, in dealing with individuals, assumes that it possesses certain corporate powers, upon which the validity of its acts depends, and it turns out that it does not possess the specific powers relied on, it is not thereby excused from the performance of its obligations, IF THEY CAN BE PERFORMED THROUGH THE AGENCY OF OTHER POWERS THAT IT DOES POSSESS."

Maher v. *City of Chicago*, 38 Ill., 273.

The doctrine in the last above cited case covers the case at bar completely. The defendant did assume to have power specific from the Legislature to call an election, vote to subscribe to the stock of the Ottawa, Oswego and Fox River Valley Railroad Company $12,000 and issue bonds in payment therefor, sold the bonds innocent individual purchasers for a valid consideration, paid erest on them for several years, and now seeks to avoid their yment on the ground that *its own officers recited on the bonds, ough carelessness, misconduct or fraud,* the wrong act, or a void t, *when there was another act in existence, giving ample power for e vote and the issue of the bonds,* or in the language of the above case: "*If they* (the obligations) *can be performed through the agency of other powers that it does possess.*"—They are valid.

To maintain such a claim for the defense would be to overrule a long line of decisions of this Court and doctrines elementary in their nature and a monstrous injustice. It would give the officials of the towns a power by false or fraudulent recitals to defeat almost any issue of such bonds and make their mere recitals superior to legislative acts and elementary principles of law, and annul the decisions of the highest judicial tribunals in the land. In this direction we cite:

Johnson Co. v. *January,* 94 U. S., 202.
Anderson Co. v. *Beal,* 113 U. S., 227.

Courts may look beyond the recitals for legislative power to issue municipal bonds; nor is the purchaser limited to the recitals. Both courts and purchaser may rely upon any act in force at the time of the vote and issue of the bonds. If this be true, they are certainly not bound by the recital of a *void act, a false recital or a recital of the wrong act* for the grant of power. The recital of *the source* of power is not necessary or binding on the purchaser, for

the very good reason that all law and decisions on this question compel the purchaser *to look to the source of power*, and not rely upon recitals. These bonds, we think, must be held good independent of any recitals.

In the case of *Commissioners* v. *January*, 94 U. S. 202, a case in all essentials analogous to the case at bar, there was an issue of bonds in which the recitals purported that they were issued under an act of February 25, 1868, which gave ample power to issue them, but that had been repealed before the bonds were issued, but after the order for an election, by an act of 1869, which repealed the act of 1868, and also gave power for the issue of the bonds. Here the *wrong act, which had been repealed, was recited in the bonds as granting the power*. The Court held the bonds valid under the act of 1869, which gave power, but was not recited on the bonds, treating as surplusage the recital of the wrong act on the bonds.

The case at bar, is even a stronger case for the purchaser, for the act cited on his bonds has been held absolutely *void* by this Court, while the act of March 6, 1867, was in full force when the vote was taken, the subscription made and the bonds executed and delivered, and the terms and conditions of which was substantially complied with in the exercise of the power.

In the case last cited, this Court says:

"This act (that of 1869), like the act of 1868, authorized the Commissioners to issue the bonds when the requirements of the law had been complied with. They were constituted a tribunal for the adjustment of all questions touching the subject. They were clothed with the power and charged with the duty to decide them. No appeal or review was provided for. Their issuing the bonds was the reflex and embodiment of their judgment that it was proper to do so. It implies a prior determination to that effect. The fact carries with it this presumption. The bonds recite that they were issued in conformity to law, and in pursuance of the election held on

the 6th of April, 1869. *It is true they refer to the wrong statute,* but *falsa demonstratio non nocet. The bad here does not hurt the good.* The act of the Commissioners was the act of the county, and the county is conclusively bound by what they have done. As between the County and a *bona-fide* holder, no question involving the infirmity of the securities can be raised."

Applying the principles laid down in the above citation to the case at bar, we do not see how the defendant can escape the payment of its bonds. In a comparatively recent case the same doctrine is sustained. In *Anderson County* v. *Beal,* 113 U. S., the language of the Court is: "The bond recites the wrong act (that of 1866), but if that part of the recital be rejected, there remains the statement that the bond is 'executed and issued' in pursuance to the vote of the electors of Anderson County, of September 13, 1869."

In the case at bar, leaving out that part of the recital which refers to the *void* act of Feb. 18, 1857, the recital is as follows, to-wit:

"This bond is one of a series of twelve bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to twelve inclusive, and *is issued in pursuance of an election or special town meeting held in said toun on the 17th day of April, A. D. 1869.* * * * At which election or special town meeting a majority of the legal voters paticipating at the same, voted '*For subscription*' to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad Company in the sum of $12,000, and to issue the bonds of said town therefor; and the said election or special town meeting was by the proper authorities then and there declared duly carried '*For subscription,*' previous application in writing of fifty legal voters of said town for such an election or special town meeting, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of said town, and the said Town Clerk having called said election or special town meeting in accordance therewith, and having given due notice of the time and place of holding the same, as required by law."

On page 239, of the last case cited, the language of the Court is:

"In view of all this, the statement of the commissioners, in the bond, that it is issued in pursuance to the vote of the electors of Anderson County, of September 13, 1869, is equivalent to a statement that 'the vote' was lawful and regular in form, and such as the law then in force required in respect to prior notice. This case is, therefore, brought within the cases of which there is a long line in this court, illustrated by the *Town of Coloma* v. *Eaves*, U. S. 484–491, etc."

In the case above, in which the *wrong Act* was recited as granting the power, while there was another Act in force that gave power, that might have been cited, but was not, this Court gave the *bona-fide* purchaser the benefits of all the other recitals in reference to the election and conditions precedent, and did not bind him to the Acts cited for power to issue the bonds, thus establishing again the rule that wrong or false recitals may be rejected, and other recitals of matters, over which the officials have entire control, be binding upon those issuing the bonds as matter of estoppel.

We cite, also, on this point:

Commissioners of Johnson Co. v. *January*, 94 U. S. 202.
Burr v. *Chariton*, 2nd McCreary, 603.

While we think the above doctrine and citations abundantly cover the case at bar, and that under them the bonds must be held good, yet there is another view of the case which ought to prevail—that the bonds are good under the law merchant, and independent of all recitals. We have shown that an examination of the Act of March 6, 1867, on which plaintiff relied in his purchase, will disclose ample power for the election and the issue of the bonds, and that the bonds themselves disclose the fact that

they are payable to bearer, and have all the incidents and qualities of a promissory note, independent of all recitals.

Dillon on Municipal Corps. Vol. 1, 541.
Ackley School Dist. v. *Hall*, 113 U. S. 139.
Moran v. *Miami Co.* 2 Black. 722.
Mercer Co. v. *Hackett*, 1 Wall. 331.
White v. *Railroad*, 21 How. 576.
Thomson v. *Lee County*, 3 Wall. 331.
Commissioners of Marion Co. v. *Clark*, 94 U. S. 278.
Cromwell v. *Co. of Sac*, 96 U. S. 51.

The bonds in this suit, appearing regular in their face in every particular, we think the doctrine of equitable estoppel is applicable. There is no taint of fraud (unless it be in the recital of the wrong act) in the vote, or the execution and delivery. They were duly registered by the State Auditor, which purports a legal issue and a full compliance with all conditions precedent.

On this point we desire to quote again from *Commissioners* v. *January*, 94 U. S. 204:

"There is no dispute between parties as to the leading facts of the controversy. The proper authorities submitted the question to the electors. * * * The proposition was sustained by a majority of more than two to one. * * * A certificate of stock was issued and delivered by the company and is still held by the county. * * * There was on each one a recital." (Here follows the recital of the Act of the Legislature, and the election, as in the case at bar.) "Each one bore the following endorsement." (Here follows the Auditor's certificate, as in the case at bar.) "The certificate is authenticated by the official signature and seal of the Auditor. The road was finished, and has since been in operation. The county and its inhabitants are in the enjoyment of the benefit arising from it."

"There is no imputation of any taint of fraud upon either side. The county authorities paid the interest upon the bonds for a time. The county received what it contracted to receive, and has paid what it contracted to pay. The plaintiff in the suit is the

bona-fide holder of the bonds. A CASE OF STRONGER EQUITY CAN HARDLY EXIST." * * * "*The act mentioned in the recital in the bond was erroneously referred to. The act does not affect the case and may be laid out of view.*"

A case more analogous than the above to the case at bar in all essential points could scarcely be prepared for adjudication. If the plaintiff was a *bona-fide* holder in the above case, he certainly must be in the case at bar, as it is a question of erroneous recital of power in both cases.

We quote still further from *Commissioners* v. *Bolles*, 94 U. S., 110: "Common honesty demands that a debt thus incurred should be paid."

"The town obtained all it expected to obtain, and ought to pay what it agreed to pay."

The People v. *Holden*, 82 Ill., 103.

The cases of *Town of Ottawa* v. *Perkins* and *Supervisors of Kendall County* v. *Post*, 94 U. S., 260, and *Post* v. *Supervisors*, 105 U. S., 667, considered in relation to the case at bar, it will doubtless be claimed by the defendant that the plaintiff in error is debarred from recovering in this case by reason of the decisions in the above cases. The only question presented, relied upon and decided in the cases above cited in 94 U. S., 260, was the validity of the act of February 18, 1857. That act and no other was claimed and relied upon as *the source of, and the only source* of power under which the bonds in controversy in both of those cases were issued. The act of 1869 is referred to as a validating act, but this court decided that the act of 1857, cited in both issues of bonds, was *void* because it was not shown affirmatively that it passed the Senate, as required by the Constitution of Illinois—that of 1848—then in force, and as to the validating act of 1869, that the Legislature could not pass an act validating an

act *void* because not passed in accordance with the requirements of the Constitution. This decision was in 1876. In October, 1881, in *Post* v. *Supervisors*, 105 U. S., 667, and *Amoskeag Bank* v. *Ottawa*, this court again passed upon the *same questions*, and say (p. 668): "These actions are brought upon municipal bonds, purporting to have been issued under an act of the General Assembly of Illinois of February 18, 1857. *The facts of the cases do not substantially differ from those which appeared when one of the cases was before this court at the October term, 1876*, and the principles then affirmed must control the present decision."

This Court further says, p. 671:

"Upon the attempt made at the argument to support their validity in the first case, under the statute of November 6, 1849, and in the second case, under the statute of March 6, 1867, it is enough to say that there is nothing in the record to show that either of those statutes was ever complied with by the defendant in issuing the bonds, or relied on by the plaintiff in purchasing them."

We present an entirely different case. We admit that the act of 1857 is *void* and claim no power under it to issue the bonds in question. Simply assert that the recital of that act on the bonds was a wrong, false and erroneous recital of the power.

That there existed ample power to call and hold the election and issue the bonds under the act of 1867, then in full force and for a long time before and after the election and issue of the bonds, and that its terms and conditions were all substantially complied with in the election and issue of the bonds. That the record shows that the plaintiff, the purchaser, *did rely upon the act of March 6, 1867*. He avers that fact distinctly, and the demurrer admits it, and the record in the act cited as relied upon, and the recital of the bonds as to conditions precedent, shows full and substantial compliance with its essential requirements

in the vote issue of the bonds. It seems, from the statements of this Court quoted above, that it was *only in the argument*—an after thought—that the plaintiffs claimed that there was any power to issue the bonds in controversy in those cases, except in the act of 1857. We therefore think the case we present *an entirely different one* from any of the above cases cited in reference to bonds purporting on their face to be issued under the act of 1857. And that this Court did not decide *any such case as we present* in those cases, but has decided all such cases as we present in favor of the bonds,—notably the case of *Commissioners of Johnson Co.* v. *January*, 94 U. S. 202, decided at the October term, 1876, and the case of *Anderson* v. *Beal*, 113 U. S. 227, decided January 26, 1885. Under this recent decison and others cited, we believe we have the law, and all the equities, with us in this case, and confidently ask this Court to reverse the decision of the Circuit Court, and validate the bonds in controversy.

GEORGE A. SANDERS,

For Plaintiff in Error.

123-59

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JAMES. H. McKENNEY.
CLERK.

* Supreme Court of the United States, *

October Term, A. D. 1887.

No. .....

HENRY S. GILSON,

PLAINTIFF IN ERROR,

vs.

THE TOWN OF DAYTON,

DEFENDANT IN ERROR.

IN ERROR TO THE CIRCU.T COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief on Part of Defendant in Error.

G. S. ELDREDGE,
COUNSEL FOR TOWN OF DAYTON.

Republican Print, Ottawa, Ill.

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GEORGE A. SANDERS,
Ed R. N. Hagan

For Plaintiff in Error.

Office Supreme Court U. S.
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* Supreme Court of the United States, *

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HENRY S. GILSON,

PLAINTIFF IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief on Part of Defendant in Error.

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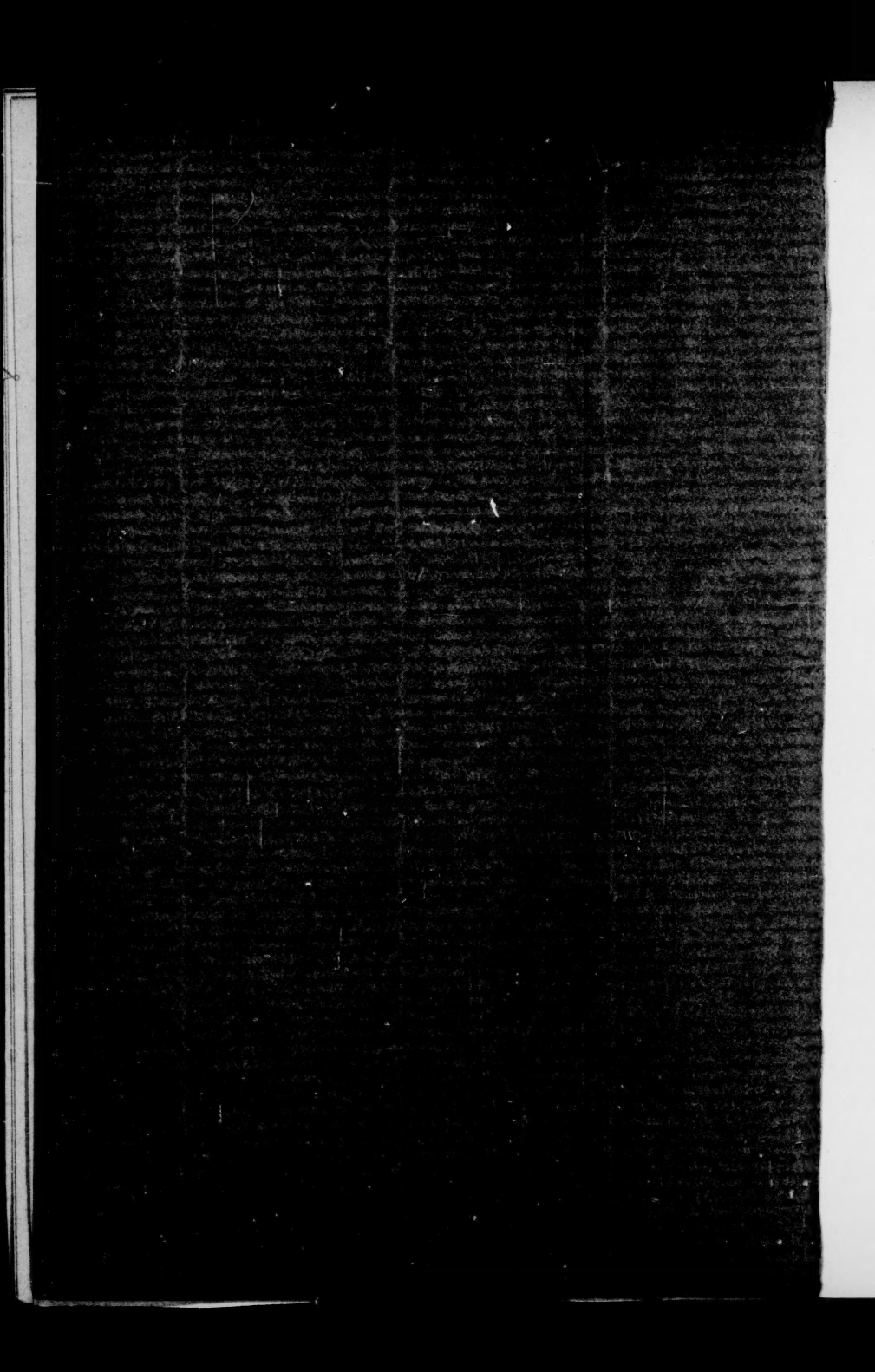

The Supreme Court of the United States,

OCTOBER TERM, A. D. 1887.

HENRY S. GILSON, *Plaintiff in Error*,
v.
THE TOWN OF DAYTON,
Defendant in Error.
} No.

BRIEF ON PART OF DEFENDANT IN ERROR.

This case seems to be a wholly groundless attempt to procure the reconsideration of a question which has been heard and conclusively settled by the Supreme Court of Illinois in the cases of

Ryan v. Lynch, 68 Ill., 160, and
Miller v. Goodwin, 70 *Id.*, 659,

and by this Court in

Perkins v. South Ottawa, 94 U. S., 260, and
Amoskeag Nat'l Bank v. Ottawa, 105 *Id.*, 667,

and the additional point sought to be now made, while necessarily covered by the three first cited cases, was most conclusively settled by this Court in the Amoskeag Bank case, last cited.

The only *real* question presented by the record is whether the bonds sued upon, which were assumed to be issued under the supposed act of February 18, 1857, *and in pursuance of no other authority whatever*, as to the plaintiff, can be regarded and sustained under the act of 1867,

cited by the plaintiff, as valid securities. The invalidity of the act of 1857, as remarked, has been twice conclusively settled by the Supreme Court of Illinois and twice determined by this Court in the foregoing cases.

The plaintiff in his declaration sets out *one* of the bonds *in haec verba*, and alleges the others to have been in all respects similiar. This appears on page 3 of the record. The circumstances under which the bonds in question were issued are recited upon the face of the bonds, and they purport to have been issued under the supposed act of the 18th of February, 1857, and in pursuance of no other assumed authority. The declaration, after setting forth the bonds and coupons (see record, pages 4 and 5), contains the averment that the plaintiff purchased the bonds "*relying* upon the faithful action of the town and state of-"ficials in their issue and registration, and *upon all laws* "*and judicial decisions in existence* at the time they were "voted and issued for their validity, and especially upon "the act of March 6, 1867, found in Vol. 1, page 866, "Private Laws of Illinois of 1867." This is the only additional suggestion made by the declaration for the validity of the bonds in question. This precise point was determined in the case of *Amoskeag National Bank v. Ottawa*, *supra*, and was there very summarily disposed of, where this Court held (page 668): "Whether a seeming act of the "Legislature is or is not a law is a judicial question to *be* "*determined by the Court*, and not a question of fact to be "tried by the jury. * * * (page 669.) An act of the "Legislature of a State that has been held by the highest "Court not to be a statute of the State, because never "passed as its constitution requires, can not be held by the "Courts of the United States, upon the same evidence, to

"be a law of the State." And again, (page 671): "Upon "the attempt made at the argument to support their va- "lidity (the bonds) * * * *under the statute of March 6,* "*1867*, it is enough to say that there is nothing in the rec- "ord to show that either of these statutes were complied "with by the defendant in issuing the bonds or relied on "by the plaintiff in purchasing them."

There is clearly nothing in the declaration in this case presenting any additional light upon this subject. There is simply a naked averment that the plaintiff *relied* on all the judicial decisions, laws and enactments *in existence* at the time they were issued, including the act of 1867, for their validity. It is not alleged or pretended that the bonds were in fact issued under the act of March 6, 1867. *No attempt was made to issue bonds in pursuance of that statute.* Nor is there any *issuable averment* in connection with the plaintiff's alleged purchase of the bonds, which affords a decent pretense that the validity of the bonds in question can be maintained under the act of 1867 (set out on pages 8, 9 and 10 of plaintiff's brief). That the plaintiff purchased them "relying * * upon all laws and "judicial decisions *in existence*, at the time they were "voted and issued, for their validity, and especially upon "the act of March 6, 1867," (Rec., foot p. 4) signifies nothing. He might as well have alleged that he relied upon the constitution of the United States for their validity. An averment as to what the *plaintiff relied* upon, on the alleged purchase of the bonds, as to what law or what *judicial decisions* would sustain their validity is not a fact upon which issue could be taken. He could not possibly have been misled in that respect by any recitals in the bonds, as the bonds *recite upon their face* that they were

assumed to be issued under the then supposed act of 1857, and in compliance with the terms of that supposed act, and not otherwise; and there is no pretense that the Town or any one having any right to speak in its behalf, ever held out or pretended to the plaintiff, or in any manner induced him to believe or suppose that the bonds were *in fact, or intended to be, issued under the act of 1867.*

This endeavor to engraft upon this case a *new feature* is a mere afterthought, having no foundation in fact or the semblance of truth to support it. The Amoskeag Bank case, *supra*, was tried before his Honor, Justice Harlan, and the attempt was made upon that trial to sustain the validity of the bonds under the act of 1867, which were precisely like those in question, and the point was again specifically made by Mr. Littler in his brief and argument, and renewed when that case was argued before this Court, and was finally passed upon by this Court and expressly covered by the opinion of the Court in that case.

The differences between the supposed act of 1857 and the act of 1867 are in many respects very marked. Under Sec. 1 of the Act of 1857 the town authorities were authorized to call an election "upon application of any fifty *vo-*
"*ters.*" (R., p. 7.)

Under the act of 1867 an election was *only* authorized to be called "upon the application of twenty legal *voters* and "*tax-payers*," etc. Thus it appears at the outset, that the very *source* of authority for the issue of bonds under the act of 1867 was never complied with. By referring to the recital in the bonds (Rec., p. 3) it will be seen that they were issued in pursuance of the provisions of the assumed act of 1857 and of an election held upon the application of "*fifty voters*"—not *tax-payers.* (See § 1 act 1857, plain-

tiff's brief, p. 7., § 1 act 1867, plaintiff's brief, p. 8.) The bond containing this recital is set out in *haec verba* in the declaration (Rec., pp. 2–3), *and made a part thereof.* The purchase of these bonds containing this explicit recital was certainly sufficient notice to the plaintiff that the bonds were *not in fact* issued nor assumed to be issued under the act of 1867.

As further illustrating the different features in detail of the two acts, I take the liberty to quote from the brief of the late Judge Dickey, one of the counsel for the defendant in error in this Court in the Amoskeag Bank case, filed upon the argument of that case, as follows :

"Section 1 of this act of 1867 gives power to townships "in La Salle county to become subscribers to the capital "stock of *any railroad* organized under the laws of Illinois "(no matter where located), and to issue bonds therefor; "the proposition to do so having been approved by the "railroad company, and the same having been submitted "to the legal voters of such township and approved by a "majority of the legal voters at an election called by the "town clerk, upon the application of twenty legal voters "and *tax-payers* of the township, specifying the amount "to be subscribed, not exceeding *one hundred thousand* "*dollars* for such town, which bonds shall in no case "bear a higher rate of interest than ten per cent. per an- "num, *and said interest* shall be paid out of the treasury "*of the county*,' provided each township, * * * by its "vote, may determine the part of the road on which its "stock subscription 'shall be expended.'

"Section 2d requires the 'clerk of the township to re- "turn the poll book of the election, together with a cer- "tificate of the result of said election, to the County Clerk

"within ten days after the election.' And if a majority of "the legal voters of the township shall have voted for the "subscription, the *County Clerk* is required to annually "thereafter cause to be computed and extended on the tax-"able property returned by the assessor of that town a "sum sufficient *to pay the interest* on all such amounts so "voted and named in the bonds, which tax shall be col-"lected as other taxes, and when collected shall be paid "into the *county treasury* as other *county* taxes.'

"The third section requires the county treasurer to pay out the same, on the presentation *to him* of the bonds so issued by the township, the amount due on each of said bonds *as interest* out of any moneys in his hands for that purpose, and to receive the interest coupons due thereon as vouchers for the same.

"Comparing the provisions of this act with those of the supposed statute of Feb. 18, 1857, it will plainly appear that the legal effect of a vote to subscribe $50,000 to this railroad company under the act of 1887 would be very different from the legal effect of a vote by the same town to subscribe the same amount to the same railroad company under the act of March 6th, 1867.

"This election was held in compliance with the provisions of the supposed statute of 1857. (See finding, record, 11.) That is, it was called on the application of fifty *voters*, but was not called on the application of *twenty tax-payers*. This is an essential condition to the exercise of the power under the act of March 6, 1867.

"The election being held under the supposed act of 1857, the vote for subscription meant that the voters consented to the making of a given contract by the town, and did not give authority to make any other or different contract than that indicated by the act of 1857.

"The contract arising from a subscription under the one act is essentially different in substance from the contract arising from a subscription under the other act.

"A contract of subscription of $50,000 under the act of 1857 meant that by so doing the town did not impair its power to make additional subscription to the same railroad company to any extent the town might thereafter choose.

"A contract of subscription of $50,000 under the act of 1867 meant that thereby its power to make additional subscriptions to *that* railroad company was thereby reduced and impaired to the extent of the amount subscribed. If this were the first subscription, it meant that the power to make such subscription was one-half exhausted.

"A contract of subscription under the act of 1857 meant that the railroad corporation might expend the amount of the subscription in any mode the corporation might choose —might pay interest on its bonds, or expend the money in any other way, with no power in the town to interfere. A contract for subscription under the act of 1867 meant that the town might by a vote require the amount so subscribed to be expended upon any particular part of the road the town might designate.

"A contract for subscription under the act of 1857 meant that the town reserved to *itself* the power and right 'to make all necessary arrangements, and *provide* for the 'prompt payment of all interest.' A contract for subscription under the act of 1867 meant that *the town* should *be deprived* of all power in making arrangements or provision for the payment of the interest or for raising the money for that purpose; such contract meant (and its legal effect would have been) to place *all power* on that subject in the hands of the *County Clerk*, and meant that

he should in each and every year extend upon the taxable property in the town a tax sufficient to pay the full amount of the accuring interest, and should so apply it. It might well be, that a town should have funds in its treasury, or other income to meet the whole or a part of the accuring interest, and hence would not need to have a tax levy made every year to the full extent of accuring interest. The contract indicated in the act of 1857, to be sanctioned by a vote of the town, *might* direct the interest to be paid by the town, at any place to be named in the bonds; and merely on the presentation of the coupons. The contract indicated in the act of 1867, to be sanctioned by a vote of the town, required the interest to be made payable by the County Treasurer at his office and *only* upon presentation *to him* of the *bonds* and upon the surrender *to him* of the coupons.

"It would be perversion, most gross, to hold that a vote for a contract of a certain character was equivalent to a vote for another contract, so essentially different as these two contracts would be. It would be a fraud upon the voters of the town so gross that no respectable Court could knowingly commit it.

"The power granted by this act of 1867 was never exercised; it was never attempted to be exercised. To make valid an act done, the power to do that act must not only exist, but it must be exercised. Here it was not exercised. No *tax-payers* applied for the election. The voters were not asked to vote for or against the contract, which a subscription under that act would produce; and they never did vote for it. They did not vote to make a subscription which would impair or reduce their power as to subsequent subscriptions. They did not vote to reserve the power of

locating the expenditure of the subscription. They did not vote to surrender the power to make their own arrangements for paying interest. They did not vote to turn that matter over to the County Clerk.

"All this had, by the act, to be approved by a vote before any power to issue bonds could arise under that act. It was not done. They did not vote for a contract requiring the interest to be made payable by the County Treasurer at his office and only upon presentation to him of the *bonds* and the surrender to him of the coupons. That no attempt was made to exercise the power of this statute, is perhaps made more plain by the fact that all these bonds and coupons were made payable *at the city of New York* and *not* at the office of the County Treasurer.

"The resort at this late day to the act of 1867 is a mere subterfuge, and can avail nothing."

Under the circumstances, and in view of the *indisputable facts* connected with the issue of the bonds in question, it seems most remarkable that it should now be seriously attempted, by counsel for plaintiff in error, to convince this Court that *this is a case* where the town authorities, *while in fact* proceeding under the act of 1867, erroneously, or by clerical error or design to deceive the purchasers of these securities, recited upon the face of the bonds, as the authority for their issue, the supposed act of 1857, when there is absolutely no foundation in truth, whatever, for such a frivolous and unfounded pretense.

The cases relied upon by counsel for plaintiff in error, viz: *Commissioners v. January*, 94 U. S., 202, and *Anderson County v. Beal*, 113 U. S., 227, afford no support whatever for the remarkable positions assumed by counsel.

In the more recent case of *Crow v. Oxford*, 119 U. S.,

215, where a somewhat similar attempt was made to support the bonds in that case, upon the authority of the two cases last mentioned, now relied upon by counsel for plaintiff in error, this Court, in the opinion delivered by Justice Blatchford, said:

"The case of *Anderson County v. Beal*, 113 U. S., 227, "is relied on by the plaintiff, but does not aid him. In "that case, although the bonds recited the wrong act, the "records of the county officers who issued the bonds did "not show any want of compliance with the latter act, but "showed a substantial compliance with it, and, in fact, the "proceedings were had and were intended to be had under "it. The reference in the bonds to the earlier act as the "source of authority was thus a mere clerical error. In "the case at bar, the reference in the bonds to the act of "March 1st, 1872, was not a clerical error, and the pro-"ceedings were intended to be had under that act, and the "records show a failure to comply with the act of March "2, 1872, and an attempt to comply only with the act of "March 1, 1872.

"In the *Anderson County* case, legislative authority "having been given for the issue of bonds by a statute, un-"der which the authorities in fact acted, the recital in the "bonds, that the bonds were issued in pursuance of the "vote of the electors, was effective to cover any irregular-"ity as to notice, which did not appear of record, but was "sought to be proved *aliunde*. In the present case no "such doctrine is applicable.

"In *Commissioners v. January*, 94 U. S., 202, an act "was recited in the bonds which has been repealed by a "later act. The order for the election was made while the "earlier act was in force. The election was held after its

"repeal, and after the new act went into force, but there "was no new order of election. Otherwise, all the pro- "ceedings after the new act went into force were in con- "formity with it. It was held that a recital in the bonds, "that they were issued 'in pursuance of, and in accord- "ance with, the vote of a majority of the qualified electors "of the county,' 'at a regular election held on' a day "named, estopped the county from raising the objection of "the want of an order under the new act, although the old "act, and not the new act, was recited in the bonds, as the "statute authority. We think that case is distinguished "from the present one by the fact, that in it all the pro- "ceedings after the new law took effect were in conformi- "ty with it, while in the case at bar none of the proceed- "ings were in conformity with the act of March 2, 1872."

The Court below, regarding it *judicially settled* by the Supreme Court of Illinois and by this Court that the supposed act of 1857 never became a law, and that the bonds could not be sustained under the act of 1867, and holding that the declaration showed no compliance with or other issuable facts whereby they might be upheld under the latter act, very properly sustained a demurrer to the declaration and rendered judgment against the plaintiff (Rec., p. 6). It seems needless to multiply words upon this record.

For the foregoing reasons it is submitted that the judgment of the Court below should be affirmed.

G. S. ELDREDGE,
Counsel for Town of Dayton.

123-59

Office Supreme Court U. S.
FILED.
FEB 7 1887.
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 1,308.

HENRY S. GILSON,
Plaintiff in Error.

vs.

THE TOWN OF DAYTON,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF ON DEFENDANT'S MOTION TO DISMISS AND AFFIRM, *Under Rule 6, and on Cross Motion of Plaintiff in Error to Perfect Appeal Bond, if Found Defective.*

GEORGE A. SANDERS,
For Plaintiff in Error.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1887.

IN THE

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

HENRY S. GILSON,
Plintiff in Error.

vs.

THE TOWN OF DAYTON,
Defendant in Error.

No. 1,308.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Cross motion to perfect appeal bond, or file bond acceptable to this court, if appeal bond in this case is found defective.

And now comes the plaintiff in error in the above entitled cause, by George A. Sanders, his attorney, and asks leave to file a cross motion; that he be allowed, under the direction of this court, to perfect the appeal bond given in this case, *if in the*

opinion of this honorable court the bond on file is in any way defective; and asks leave to file his power of attorney of date January 31st, 1887, ratifying and confirming all that had been done in reference to said appeal bond by his attorney, of record in this case.

HENRY S. GILSON, *Plaintiff in Error.*

By GEO. A. SANDERS, *his Attorney.*

BRIEF ON DEFENDANT'S MOTION TO DISMISS AND AFFIRM,

Under Rule 6, and on cross motion of plaintiff in error to perfect appeal bond, if found defective.

The motion of the defendant in error to dismiss the appeal is based, *first*, on the ground that the appeal bond was not signed by plaintiff in error, and that no authority of record is shown from him to his attorney, Geo. A. Sanders, to sign his name to the bond, and that thereby this court has no jurisdiction of this case.

We reply that the bond offered and approved by the Judge of the Circuit Court, H. W. Blodgett, and filed Nov. 26, 1886, (Record, p. 6, 7) was in the usual form, except that the appellant's name was signed by his attorney, and for $500. It was simply for costs, as he, defendant in error, was successful in the Circuit Court in having his demurrer sustained. The fact that it was to act as a *supersedeas* is of no force, as the costs in the Circuit Court have all been paid, including the docket fee of defendant's attorney, as will appear by the certificate of the clerk of that court of date January 27, 1887, herewith filed, and deposits in cash have been made with the clerk of this honorable court to cover all estimated expenses herein.

The form, amount and sufficiency of the security of an appeal or supersedeas bond, are all questions to be determined by the judge of the Circuit Court. He passed upon all these questions, and we submit that his decision is final, and not subject of review in this court.

In *Jerome* v. *McCarter*, 21 Wall. 17, this court say:

> *"The amount of a supersedeas bond, as well as the sufficiency of the security, are matters to be determined by the judge below, under the provisions of the 29th rule. The discretion thus exercised by him will not be interfered with by this court."*

In the case at bar there is no question about the sufficiency of the security, which was satisfactory to the judge in the court below, and accepted and approved by him.

Again, in *Martin* v. *Hazard Powder Co.*, 93 U. S. 302, this court say:

> "We held in *Jerome* v. *McCarter*, 21 Wall. 17—after much consideration—that if, 'after the security has been accepted, the circumstances of the case, or of the parties, or of the securities upon the bond, have changed, so that security which, at the time it was taken, was good and sufficient, does not continue to be so, we might, upon a proper application, so adjudge and order as justice might require.' *But upon facts existing at the time the security was accepted, the action of the justice, within the statute and rules of practice adopted for his guidance, is final.*"

It is not claimed, in support of defendant's motion, that *the facts existing at the time the security was accepted*, have changed in any respect. Unquestionably they are entitled to a good bond if they demand it, and they have it in the one on file approved by the judge of the court below, whose right it was to pass upon the form of the bond and the sufficiency of the sureties. He did approve of both, and we think his action is final in the case at bar. The defendant can lose nothing if that bond stands as effective in this court, for the reason that all costs have been paid in the

court below, as shown, *supra*, and all estimated costs in this court covered by cash deposits with the clerk of this court. The sureties are worth over $200,000, and the defendant would not have to search long nor out of the State to find them to respond upon any claim it might have upon them.

The evidence presented to the judge, to satisfy him of the form of bond, and the sufficiency of the sureties, is a matter not necessary to go into the record, or be reviewed in this court, since his approval of the bond, and its acceptance, in a case like this, is a finality on those questions, under the above decisions of this court.

The same rule, and case of *Jerome* v. *McCarter*, *supra*, is cited and followed in *Williams* v. *Chaflin*, 103 U. S. 753. It would therefore seem to be a rule of this court to accept an appeal bond, accepted and approved by the Judge of the Circuit Court, as final and past review in this court, when there had been no change in the circumstances of the sureties from the time of the approval and acceptance of the bond, in a case like this at bar. We think, moreover, the motion *frivolous*, and an effort to dispose of the case without meeting it upon its merits.

But even if this court should conclude to review the action of the Circuit Judge, and hold the appeal bond informal and insufficient, we think there is no possible question but that we have the right to perfect the bond on file, or file one acceptable to the court, under such orders as this court might impose; that no motion to dismiss the appeal, and confirm the judgment in the Circuit Court, can prevail until the plaintiff has failed to comply with any orders this court might impose as to perfecting the bond on file, or filing a bond acceptable to this court.

In *Dayton* v. *Lash*, 94 U. S. 112, this court say:

"An appeal, although allowed *out of term*, is not avoided by the non-service of a citation; but this court will impose such terms upon the appellant, as under the circumstances may be legal and proper."

Villobolos v. *United States*, 6 How. 90.
United States v. *Curry*, Id. 112.
City of Washington v. *Dennison*, 6 Wall. 496.
Martin v. *Hunter's Lessee*, 1 Wheat. 361.
Davidson v. *Lanier*, 4 Wall. 454.

It will not be denied that the appeal was prayed and allowed in open court when the judgment was rendered in the case at bar.

In *Railroad Co.* v. *Blake*, 100 U. S. 661, the language is:

"The appeal will not, however, be dismissed in the latter case, but terms will be imposed upon the appellant."

Again, "but as the court accepted it, it must be considered as a sufficient compliance with the order of the court, and that it had relation back to the time of the allowance of the appeal."

Peugh v. *Davis*, 110 U. S. 227.
Kitchen v. *Randolph*, 93 U. S. 92.

"The bond was not essential to it,"—the appeal.) "*It could have been given here, and cases have been brought here when no bond was approved by the court below, and the court has permitted the appellant to give bond in this court.*"

Edmonson v. *Bloomshire*, 7 Wall. 311.

"Where, through mistake or accident, no bond, *or a defective bond*, has been filed, *this court will not dismiss the appeal* if it is in all other respects quite regular, except on failure to comply with an order to give the proper security within such reasonable time as it may prescribe."

Seymour v. *Freer*, 5 Wall. 822.
Appeal bond filed *nunc pro tunc*.
Brobst v. *Brobst*, 5 Wall. 96.
Dodge et al v. *Knowles*, 114 U. S. 430.

In a case dismissed for want of jurisdiction, this court cannot give costs.

Streater v. *Graham* 18 How. 602.

This doctrine is the rule in the State Courts of Illinois. Revised Stat. Ills. (Cothran's Annotated Ed. 1881,) 1109, Sec. 70, and numerous citations.

Under the above citations, we think the *power of attorney*, filed in the case at bar, ratifying and confirming the execution of the appeal bond by the appellant, cures all defects to the bond, if any existed. But if in the opinion of this court, the bond is in any way defective, or insufficient, the appellant is ready to file a bond acceptable to this court under such reasonable terms as it may impose upon him.

SECOND.

The motion "to affirm the judgment below, under Section 5, of Rule 6, of this court, upon the ground that the writ of error, as shown by the Record, was manifestly taken for delay to effect some ulterior purpose, and is beyond all question *frivolous*." defendant's brief (p. 4,) is in our opinion an effort to evade a consideration of the merits of the case. For the record nowhere shows *any disposition to delay, nor any ulterior purpose*. The suit was brought in the best of faith, and believing that under the laws applicable to the case, his suit would be maintained by this court. And so anxious was the appellant and his attorney to hasten proceedings, that a brief was prepared and is now on file in this court in which it was hoped the case might be submitted under Rule 20, of this court.

On what ground the defendant's counsel can say that the suit *is frivolous*, we cannot understand. We think we stand upon

principles and decisions that are well established, and that upon investigation this court will reverse the judgment of the court below.

Appellee's counsel claim that all questions involved in the case at bar were settled by this court in *Perkins* v. *So. Ottawa*, 94 U. S. 260, and *Amoskeag Nat. Bank* v. *Ottawa*, 105 U. S. 667. These two cases were practically but one, and the question we present we think was not settled by either of them.

We can only respectfully refer this court to our brief in the case on file for a full statement of the principles and decisions on which we rely in the case at bar, and as the best evidence we can offer that this suit was *not appealed for delay, or for any ulterior purpose, or on any frivolous grounds.*

Respectfully submitted,

GEO. A. SANDERS,

For Plaintiff in Error.

123-59

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CLERK

* Supreme Court of the United States, *

October Term, A. D. 1886.

No. 1308.

HENRY S. GILSON,

PLAINTIFF IN ERROR,

vs.

THE TOWN OF DAYTON,

DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

Brief on Motion to Dismiss & Affirm Under Rule 6.

G. S. ELDREDGE,

COUNSEL FOR TOWN OF DAYTON.

The Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

HENRY S. GILSON, *Plaintiff in Error*,
v.
THE TOWN OF DAYTON,
Defendant in Error.
No. 1,308.

BRIEF ON MOTION TO DISMISS AND AFFIRM UNDER RULE SIX.

1. The bond upon which the writ of error was allowed to be made a supersedeas purports to have been executed by George A. Sanders, Ralph W. Haynes and Frank W. Tracy, with their private seals attached. It further appears (Rec., p. 7) that the bond was *assumed* to be signed by George A. Sanders on behalf of Henry S. Gilson, the latter being the plaintiff in error. It is true the Court below approved this bond, but *non constat* it would not have approved the bond but for the sufficiency of the security afforded *by the name of Henry S. Gilson.* While it may be true that Henry S. Gilson was pecuniarily responsible, yet there is nothing in the record showing that George A. Sanders had the right to attach the name of Henry S. Gilson to this writing obligatory. Sanders does not appear to have even signed it as attorney in fact for Gilson, and has attached his own private seal only. It does not appear affirmatively that Gilson is liable upon the bond, nor was there any power of attorney from Gilson to

Sanders or other proof of authority from Gilson to Sanders to sign this bond.

The object of the bond provided for by Section 1,000 of the judiciary act is to afford to the defendants in error ample protection for the recovery of costs in case of an affirmance of the judgment or the dimissal of the suit in this Court, and the defendant in error is entitled to have a bond *prima facie valid*, to say the least. In other words, a bond executed by Henry S. Gilson, or by his attorney in fact, *thereunto duly authorized*, and the authority of the attorney in fact should be made to appear as a part of the record. The record discloses no such authority. If suit were brought upon this bond to recover the penalty against Henry S. Gilson, no recovery could be had against Gilson upon the production of the bond and proof that the signature, purporting to be that of Gilson, was appended by Sanders, who has assumed to attach Gilson's name to it. The statute manifestly requires a bond at least *prima facie* good upon its face. It was never intended that the defendant in error, a corporation in Illinois, should go searching about the State of New Hampshire, or elsewhere, to ascertain whether Gilson had authorized Sanders to execute this bond in his behalf; hence it has not the statutory protection by the execution of this instrument which the statute is intended to give. *Prima facie Sanders had no authority* to execute this bond. The Judge of the Court below has not assumed to certify that he had, nor does it appear that any proof was submitted to him to show that Sanders had authority to execute this instrument on behalf of Gilson. *Prima facie* the bond, as against Gilson, is, therefore, a void obligation. The action of the Judge approving the sufficiency of the security can not be made available to the defendant in error to sustain a recovery upon this bond if Gilson were sued upon it and pleaded *non est factum*. The record should show that this

bond is the obligation of Gilson to give this Court jurisdiction, *and in such case* the record would be conclusive against Gilson as to the authority of Sanders to attach his name.

The defendant in error, it is submitted, is not required to follow the litigation of this case through this Court with a colorable indemnity, *prima facie unauthorized to be executed by Sanders;* and, as suggested, there being three or four names on it, the Judge might never have approved this bond except upon satisfactory information as to the responsibility of Gilson. If the bond was unauthorized to be executed by Gilson, the principal, the question may arise, what is the liability of the sureties? If Sanders, Haynes and Tracey simply executed this bond over their own proper signatures, with their own proper seals attached, and the Judge of the Court below had added his approval of the security, the bond would be good, for it would be assumed that the Judge added his approval upon satisfactory evidence to him of the responsibility of Sanders or Haynes or Tracey, or of some one or more of them. The approval of a bond executed as it was in this case was probably an oversight on the part of the Judge of the Court below.

When the record is filed and there is an apparent want of jurisdiction a motion to dismiss will be entertained *at any time* for want of jurisdiction.

Clark v. Hancock, 94 U. S., 493.

And the Court will often dismiss in a case of that character upon mere suggestion without formal application.

Edmunson v. Bloomshire, 7 Wall., 306.

The jurisdiction of this Court upon appeal or writ of error must depend upon the judiciary act with respect to all questions as to whether the appeal or writ of error has been perfected.

Slaughter House Cases, 10 Wall., 73.

2. In connection with the foregoing motion the defendant in error moves to affirm the judgment below, under Section 5 of Rule 6 of this Court, upon the ground that the writ of error, as shown by the record, was manifestly taken for delay to effectuate some ulterior purpose, and is beyond all question *frivolous*; a mere inexcusable attempt to procure the reconsideration of a question which has been heard and conclusively settled by this Court in the cases of *Perkins v. South Ottawa*, 94 U. S., 260, and *Amoskeag National Bank v. Ottawa*, 105 U. S., 667.

The only question involved in this record is the validity of the bonds under the act of the General Assembly of Illinois, of February 18, 1857, which was held by this Court in two foregoing cases, and by the Supreme Court of Illinois in the two following cases to have never become a law, viz:

Ryan v. Lynch, 68 Ill., 160.
Miller v. Goodwin, 70 Id., 659.

The plaintiff in his declaration sets out one of the bonds in *hæc verba*, and alleges the others to have been in all respects similiar. This appears on page three of the record. The circumstances under which the bonds in question were issued are recited upon the face of the bonds, and they purport to have been issued under the then supposed act of the 18th of February, 1857, and in pursuance of no other authority. The declaration after setting forth the bonds and coupons (see record, pages 4 and 5) contains the averment that the plaintiff purchased the bonds "relying upon the faithful action of "the town and state officials in their issue and registration, "and upon all laws and judicial decisions in existence at the "time they were voted and issued for their validity, and "especially upon the act of March 6, 1867, found in Vol. 1, "page 866, Private Laws of Illinois of 1867." This is the only additional suggestion made by this declaration for the

validity of the bonds in question. This precise point was determined in the case of *Amoskeag National Bank v. Ottawa*, *supra*, and was then very summarily disposed of where this Court held (page 668): "whether a seeming act of the Legis- "lature is or is not a law is a judicial question to *be determin-* "*ed by the Court*, and not a question of fact to be tried by the "jury. * * * * * (page 669.) An act of the Legisla- "ture of a state that has been held by the highest Court not "to be a statute of the state, because never passed as its "constitution requires, can not be held by the Courts of the "United States upon the same evidence to be a law of the "State." And again, (page 671): "Upon the attempt made "at the argument to support their validity (the bonds) * * * * * *under the statute of March 6, 1867*, it is enough to "say that there is nothing in the record to show that either "of these statutes were complied with by the defendant in issu- "ing the bonds or relied on by the plaintiff in purchasing "them."

There is clearly nothing in the declaration in this case presenting any additional light upon this subject. There is simply a naked averment that the plaintiff relied on the judicial decisions, laws and enactments in existence at the time they were issued as to their validity. It is not alleged or pretended that the bonds were issued under the act of March 6th, 1867. No attempt was made to issue bonds in pursuance of that statute. Nor is there any issuable averment that the plaintiff purchased them, believing them to have been issued under the act of 1867. He could not have been misled in that respect, as the bonds *recite upon their face* that they were assumed to be issued under the then supposed act of 1857, and in compliance with the terms of that supposed act, and not otherwise.

Exhibit No 1. (Deft's of N. Whitley)
Defendants Evidence

NORTH

684

PLAT OF PART OF SECTIONS 11 & 14 JOLIET WILL COUNTY ILLINOIS
SHOWING TERRITORY AROUND WATER WORKS

SCALE 264 FEET TO AN INCH

NOVEMBER A.D. 1885.
N. WHITLEY

ELEVATIONS ARE GIVEN FROM CITY DATUM LINE
50 FEET BELOW WATER TABLE OF OLD COURT HOUSE.

No 1114
City of Joliet
Foster et al.
} p. 684